



1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**

3 **CAUSE NO. G 0191 of 2016**

4
5 **BETWEEN:**

6 **JOHNATHAN PARCHMENT**

7 **PLAINTIFF**

8 **AND:**

9 **ROLLAND HENRY**

10 **DEFENDANT**

11
12
13 **Appearances:** **Plaintiff represented by Mr. James Kennedy &**
14 **Ms. Kim Grandage instructed by KSG,**
15 **Attorneys-at-Law**

16 **Defendant represented by Stephen Grime QC**
17 **& Mr. Colm Flanagan instructed by Nelson &**
18 **Company.**

19 **Before:** **Hon. Nova Hall Judge of the Grand Court (Acting)**
20

21 **Date of Hearing:** **31st January 2018 & 1st February 2018**
22

23 **Date of Delivery**
24 **of Judgment:** **7 May 2018**
25

26 **JUDGMENT**

27 1. This action concerns the issue of liability following a motor vehicle
28 collision. On December 4, 2013, the Defendant was driving a

1 Toyota Highlander motor vehicle with registration number 60285.
2 The Plaintiff drove a Yamaha motorcycle with registration number
3 148582. Both vehicles collided on Shamrock Road sometime after
4 8:00 PM. Also present on the scene was Mr. Kevin Walton who
5 was driving his own vehicle.
6

7 **Agreed Facts**

8 2. The following details were agreed by both sides.

9 1. The motorcycle driven by the Plaintiff was not owned
10 by him but was owned and registered to Mr. Bijon
11 Clark. Ownership of the motorcycle had been
12 transferred to Mr. Clark by the Plaintiff on 14th October
13 2013.

14 2. British Caymanian Insurance Company Limited
15 provided third-party motor-vehicle insurance to Mr.
16 Clark in respect of the motorcycle and the policy of
17 insurance applied only when the motorcycle was being
18 driven by Mr. Clark.

19 3. The Plaintiff was not insured to drive the motorcycle.

20 4. The Plaintiff was qualified, and held a licence to drive
21 vehicles falling within Group 2, being mopeds, motor
22 cars, taxis and trucks not exceeding 8,500 lbs,



1 omnibuses not exceeding a seating capacity of fifteen
2 persons in addition to the driver, towing a trailer not
3 exceeding 2,000 lbs except Groups 1 and 1A.

4 5. The Plaintiff had held a Group 2 licence since 2nd May
5 2007.

6 6. The motorcycle fell within Group 1.

7 7. The Plaintiff obtained a Learners or Provisional License
8 ("the Learners License") in respect of Group 1 vehicles
9 on 17th of April 2013.

10 8. The Plaintiff's Learners License expired on 17th
11 October 2013.

12 9. A Learners License is valid for six months and may, be
13 renewed for a further period of six months, after which
14 no renewals are permitted unless the applicant has
15 taken at least one driving test under section 35 of the
16 Traffic Law (2011 Revision) since the last renewal.

17 10. Section 36 (1) of the Traffic Law (2011 Revision)
18 requires a learner driver to drive with "L" plates front
19 and back.

20 11. In order to obtain a Group 1 license, in addition
21 to passing the test, the Director may have also
22 required proof that the Plaintiff successfully complete



1 a basic rider safety course approved for that group of
2 driver's license, pursuant to regulation eight (5) of
3 traffic regulations (2012).

4 12. At the material time the Plaintiff drove on the
5 motorcycle without L plates and without there being
6 in place a policy of motor insurance for his use.

7 13. The Plaintiff was convicted on 22nd of August
8 2016 in the Summary Court of driving without being
9 qualified and driving without insurance.

10 14. The Defendant was convicted on 22nd March
11 2017 in the Summary Court of careless driving.

12 15. The Plaintiff was driving the motorcycle while
13 properly wearing a crash helmet.

14 16. The Plaintiff was driving the motorcycle with the
15 low beam headlamp on.

16 17. The Defendant was driving the Toyota with the
17 low beam headlamps on.

18 18. The Defendant's vehicle was stopped or moving
19 very slowly at the time of the collision.

20 19. The Defendant's vehicle was 3 to 4 feet across
21 the lane line that separates the right turn lane from



1 the westbound lane with its right front corner in the
2 westbound lane at the time of the collision.

3 20. The motorcycle was in the westbound lane 2 to
4 3 feet from the yellow lane line on the north (right)
5 side of the westbound lane at the time of the collision.

6 21. If the Plaintiff had maintained the motorcycle in
7 the centre of the westbound lane the collision would
8 not have occurred.

9 22. If the Defendant had not crossed from the
10 centre turn lane into the westbound lane the collision
11 would not have occurred.

12 23. The speed limits for the road on which the
13 collision occurred was 40 mph.

14 24. The overhead street lighting in the area of the
15 collision was adequate.

16 **Facts in Dispute**

17 3. The following issues were not agreed between the parties:

18 (1) the speed at which the motorcycle was travelling at the
19 time of the collision is not agreed subject to the fact that it
20 is agreed it was between 34 to 45 mph;

21 (2) the impact angle between the motorcycle and the Toyota;



1 (3) whether the motorcycle crossed into the centre lane prior
2 to the impact.

3 **The Evidence from the Drivers**

4 4. The Defendant testified that at approximately 8:00 PM on the date
5 in question he was travelling east along Shamrock Road. He stated
6 that the weather was clear, the road was dry and there was an
7 inoperative streetlight in the vicinity where the accident
8 happened. There were two lanes heading east and he was in the
9 right lane. He slowed almost to a stop at the intersection and put
10 on his indicator to turn right. He saw a car in front of him coming
11 from the opposite direction travelling west on Shamrock Road.
12 This was driven by Mr. Kevin Walton.

13
14 5. The Defendant proceeded to turn right moving very slowly. He
15 stated that his right front wheel was approximately 18 inches to a
16 few feet over the westbound lane of Shamrock Road and he was
17 turned slightly to the right when he felt and heard an impact.

18
19 6. The Defendant stated that he did not see what struck his vehicle.
20 He did not hear any braking or notice any skid marks after the
21 collision. There had been no vehicles obstructing his view.



1 7. The Defendant testified that at the time of the collision he was not
2 at a virtual stop but that he had slowed down almost to a stop. He
3 stated that he did not apply his brakes prior to the impact.

4
5 8. He testified that he stopped his vehicle and Mr. Walton came over
6 to him and told him that the motorbike had struck his vehicle.
7 Further he allegedly stated that it had no lights and was travelling
8 at speed. The Defendant observed the motorbike at a position of
9 rest with the rider lying on the ground, injured.

10
11 9. During cross-examination the Defendant conceded that he did not
12 make the proper manoeuvre for a right-hand turn as shown in the
13 Road Code of the Cayman Islands. It was suggested to him that
14 he had in fact cut the lane.

15
16 10. The Defendant stated that he had not been aware of any other
17 vehicle following Mr. Walton's vehicle. He stated that there was no
18 deliberate disobedience to the Road Code on his part and that he
19 had been proceeding cautiously.

20
21 11. Mr. Jeoffery Kevin Walton also testified. He stated that on the date
22 in question, he was travelling in the westbound lane along
23 Shamrock Road with the intention of taking a left turn towards the
24 Red Bay roundabout. He put on his indicator and began to slow in



1 order to carry out this manoeuvre. As he began his turn, he heard
2 and then observed a motorcycle pass his vehicle travelling straight
3 in the westbound lane. At the same time he became aware of
4 another vehicle travelling eastbound which indicated a right turn
5 and started to move into the right turning lane.

6
7 12. He stated that he continued to watch the scene because he could
8 see that the other vehicle was encroaching into the westbound
9 lane and he feared that an accident may occur. He stated that he
10 had a clear and unobstructed view and that a few streetlights were
11 in the vicinity. He saw when the motorcycle hit the front of the
12 Defendant's vehicle and the motorcycle rider was thrown off and
13 into the grass verge. He stopped his vehicle, called 911 and went
14 over to the drivers.

15
16 13. While the initial statements of the Defendant and Mr. Walton
17 raised doubts concerning whether the motorcycle on which the
18 Plaintiff was travelling had lights; by the time of trial both sides'
19 aided by experts agreed that it had been travelling with the low-
20 beam headlamp on.



1 14. During cross-examination Mr. Walton denied having told the
2 Defendant anything about the speed of the motorcycle. He
3 testified that he would not estimate that the motorcycle had been
4 travelling at a high speed or was otherwise breaking the speed
5 limit.

6
7 15. The Plaintiff received severe injuries as a result of the collision. He
8 recalled travelling on the motorcycle in the eastbound lane with
9 the intention of going to the gas station at the end of that road.
10 He had no other recollection of that night.

11
12 16. During cross-examination he admitted that on the date in
13 question, he knew that his license had lapsed. He admitted that
14 he was "taking a chance" when he rode the motorcycle on a lapsed
15 license. He testified that based on what he had been told by the
16 motorcycle owner, he believed that he was covered by the owner's
17 insurance when he rode the vehicle.

18
19 **Expert Evidence**



1 17. Evidence from experts was presented at trial. Rather than risk
2 repetition, the commentary on this evidence, made by each side
3 during closing submissions will be relied on.

4 **The Plaintiff's Submissions**

6 18. Counsel for the Plaintiff defined the principal issues as follows:

7 1. Was the Defendant's driving negligent? If so, did the
8 negligent driving cause the Plaintiff to be injured?

9 2. In the event that it was negligent, was the Plaintiff guilty of
10 contributory negligence?

11 3. If liability is apportionable to the Defendant, can the
12 Defendant rely on the doctrine of *ex turpi causa non oritur*
13 *actio* to avoid that liability?

14
15 19. Counsel for the Plaintiff set out sections of the Road Code as
16 considered relevant to the Defendant's driving.

17 "1.3

18 (a) *Before making a right-hand turn, give the right of way*
19 *to all approaching traffic.*

20 (g) *keep a watch on the road behind and in front of the vehicle*
21 *being driven*

22 *Before making a right hand turn you SHOULD:*



- 1 (i) *Observe all other traffic on the road in front and behind.*
2 (iv) *Come to a stop if traffic is still coming from the opposite*
3 *direction;*
4 (v) *Execute the turn in an even and deliberate manner as*
5 *soon as the road is clear;*
6 (vi) *Turn to arrive on the left hand side of the road into which*
7 *the turn is made, passing any road island or lane divider*
8 *to the left;*

9 **3.9 Road Junctions and Give Way Rules**

10 *You are to be especially careful at junctions that are*
11 *uncontrolled or have an absence of signs or road markings. At*
12 *all junctions you are required to take adequate precautions.*

13 *Therefore be alert:*

- 14
 - *For all road users and motor vehicles, especially*
15 *cyclists/motor cyclists/children/pedestrians. Remember*
16 *they may not be visible.*

17 **3.10 DO NOT**

- 18
 - *Cross or join a road until there is a gap large enough for*
19 *you to do so safely.*

20 *ALWAYS look to your right and left before turning onto the*
21 *roadway. Make absolutely sure there is sufficient room before*
22 *proceeding. "*

24 20. It was submitted that the Plaintiff had the right of way as he was
25 proceeding along the main road and not turning. The Defendant



1 did not have the right of way and was making a right hand turn.
2 Further, the Defendant conceded that he did not see the Plaintiff
3 at any time before the collision and confirmed in evidence that the
4 road was clear and straight and that he could have seen him.
5

6 21. Counsel for the Plaintiff also submitted that it was accepted that
7 the accident occurred 3-4 feet into the lane in which P was
8 travelling i.e. the lane containing on-coming, approaching traffic.
9 3-4 feet is approximately 1/3rd of the lane width of 12 feet.
10

11 22. It was also submitted that the Defendant should be criticized for
12 the following:

13 (a) Entering the oncoming lane prior to arriving at the left-hand
14 side of the road he was intending to turn into. By doing so he
15 restricted his view of on-coming traffic travelling behind Mr.
16 Walton.

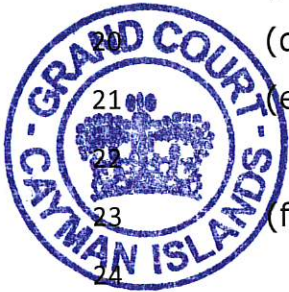
17 (b) Failing to give way to approaching traffic. Irrespective of the
18 angle of approach of P, he represented "approaching traffic".

19 (c) Failed to stop in his own lane as P approached.

20 (d) Was not alert to the possible approach of a motorcyclist.

21 (e) Attempted to cross the road when there was not enough
22 time to do so safely.

23 (f) Failed to look to his left before turning onto the roadway. D
24 appears to have focused solely on the approach of Mr. Walton



1 and then proceeded to wrongly discount the possibility that
2 any other traffic was following Mr. Walton.

3
4 **The Issue of Contributory Negligence**

5 23. Counsel for the Plaintiff challenged the bases on which the
6 Defendant argued that the Plaintiff was guilty of contributory
7 negligence.

8
9 24. It was pointed out that the Defendant had abandoned the
10 argument that the Plaintiff rode the motorcycle without lights. It
11 was noted additionally that the Defendant abandoned his claim
12 that he was no more than 12-18 inches inside the Plaintiff's lane.
13 Aided by experts it was accepted that he was between 3-4 feet
14 into the lane of the on-coming motorcycle.

15 **Speed of the Plaintiff**

16 25. Counsel for the Plaintiff challenged the allegation made by the
17 Defendant that the Plaintiff had been speeding.

18
19 26. On 6th June 2017, the Defendant's expert, Mr. Jeffrey Armstrong
20 produced a report claiming that the Plaintiff was travelling at
21 between 45 and 56 miles per hour prior to the accident.



1 27. This finding on speed was then conceded as being entirely wrong
2 by a very significant margin. Mr. Armstrong amended the speed
3 downwards to a range of 37-45 miles per hour.

4
5 28. On the day of trial the expert Mr. Armstrong conceded his
6 calculations were still wrong. He reduced his range of speed for
7 the Plaintiff to between 33 and 43 miles per hour.

8
9 29. In cross-examination Mr. Armstrong gave evidence that the
10 probability within that range was subject to a bell-shaped curve.
11 It was submitted that on the basis of a bell-shaped probability
12 curve the Plaintiff was most probably travelling at around 37 miles
13 per hour based on the Defendant's evidence. Plaintiff's Counsel
14 argued that this was comfortably within the speed limit.

15
16 30. The Plaintiff's expert was Mr. Robert Wagstaff. In his report the
17 speed range is between 33 and 37 mph with the same bell-shaped
18 probability curve giving the most probable speed of 35 mph.
19 Plaintiff's Counsel argued that this was consistent with the eye
20 witness evidence of Mr. Walton. Mr. Walton had also denied that
21 the Plaintiff had been speeding.

22



1 **Plaintiff travelling in the turning lane**

2 31. Another suggestion on the Defendant's case was that the Plaintiff
3 had been travelling in the turning lane prior to the accident.

4
5 32. Plaintiff's Counsel submitted that this argument ran against the
6 clear evidence of the independent witness, Mr. Walton, who saw
7 the entire approach to the accident of the motorbike and denied
8 that the bike had entered the turning lane. This response was not
9 questioned or altered during cross-examination.

10
11 33. Counsel cited from *Stewart (protected party by his litigation friend*
12 *Ramwell) v Glaze [2009] EWHC 704 (QB)*, the comment of
13 Coulson J:

14
15 *"In my judgment, it is the primary factual evidence which is*
16 *of the greatest importance in a case of this kind. The expert*
17 *evidence comprises a useful way in which that factual*
18 *evidence, and the inferences to be drawn from it, can be*
19 *tested. It is, however, very important to ensure that the*
20 *expert evidence is not elevated into a fixed framework or*
21 *formula, against which the Defendant's actions are then to*
22 *be rigidly judged with a mathematical precision."*



1 34. In response to Mr. Armstrong’s opinion that often witnesses can
2 be mistaken, Counsel for the Plaintiff submitted that Mr. Walton
3 was a most clear and impressive witness. He was entirely neutral
4 and gave evidence of having seen the entire accident unfold, from
5 the Plaintiff passing his vehicle to the Defendant encroaching into
6 the westbound lane and hence his concern that an accident would
7 happen and finally his recollection of the conversation with the
8 Defendant after the accident contradicting the Defendant’s
9 statements regarding speed and lights.

10
11 35. Counsel for the Plaintiff contrasted the expert evidence of Mr.
12 Armstrong with that of the Plaintiff’s expert, Mr. Wagstaff. Mr.
13 Wagstaff’s opinion was twofold:

14 (a) that a collision between a rider and a vehicle has so
15 many variables that the level of certainty prescribed by Mr.
16 Armstrong to say that the rider must have hit the vehicle at
17 17 degrees just cannot exist.

18
19 (b) Even if the angle of impact was 17 degrees this does
20 not lead to the conclusion that pre-impact, the motorbike
21 had been in the turning lane.

22
23 36. The evidence of Mr. Wagstaff was urged as being reasonable and
24 much preferable to that of Mr. Armstrong.



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37. Counsel for the Plaintiff argued that the variables that doubt the certainty of Mr. Armstrong’s opinion are as follows;

“

- (a) The only evidence to support his exact angle was the fact that the head/helmet of P did not strike the A pillar.
- (b) There is clear evidence that P’s leg hit the bumper of the car with sufficient force to cause a cut to his leg leaving blood behind.
- (c) There is clear evidence that another part of P struck the bonnet of the car.
- (d) Both (b) and (c) accord with the description of Mr. Wagstaff of a collision between a motorcycle rider and a car as a “chaotic event”
- (e) It is entirely possible that the after passing Mr. Walton on the extremity of the westbound lane P was =moving gently back to centre of his lane creating an angle of 17 degrees;
- (f) being faced with the oncoming vehicle of D who conceded in evidence that he was moving into the lane of P at the time of the collision that P at the last second veered to the left but without sufficient time to avoid the collision.”



38. Mr. Wagstaff testified that had the Plaintiff been driving in a straight line this would still have created an angle of 10 degrees and thrown the Plaintiff to his left. Counsel argued that this is not to be mistaken with Mr. Wagstaff giving evidence that the Plaintiff

1 had been driving at 10 degrees, it is merely demonstrative that
2 the perception that 17° was being compared to 0° is wrong.

3
4 39. Counsel argued that contrasting a straight line drive angle of 10°
5 with 17° made it is clear that the margin of error is small and the
6 degree of certainty given by Mr. Armstrong is simply not possible.

7
8 40. It was submitted that it was impossible for the Court to conclude
9 that the Plaintiff was riding in the turning lane as this would
10 involve accepting doubtful and contested opinion of Mr. Armstrong
11 over actual eye witness evidence and the Court should accept the
12 evidence of Mr. Walton that the Plaintiff did not enter the turning
13 lane.

14
15 **Legal Test on Contributory Negligence**

16 41. With regard to the test for negligence Counsel for the Plaintiff cited
17 the following:

18 In *Stapley v Gypsum Mines Ltd. [1953] A.C. 663* Lord Reid stated:

19 "A court must deal broadly with the problem of
20 apportionment and in considering what is just and
21 equitable must have regard to the blameworthiness of
22 each party, but the claimant's share of responsibility
23 for the damage cannot, I think, be assessed without



1 *considering the relative importance of his acts in*
2 *causing the damage apart from his blameworthiness."*

3
4 42. Additionally, Lord Wright in *M'Lean v Bell 1932 SC (HL)21* on the
5 issue of apportionment of liability stated as follows:

6 *"The decision . . . must turn not simply on causation*
7 *but on responsibility; the plaintiff's negligence may be*
8 *what is often called causa sine qua non, yet as regards*
9 *responsibility it becomes merely evidential or matter*
10 *of narrative if the defendant acting reasonably could*
11 *and ought to have avoided the collision."*

12
13
14 43. Counsel for the Plaintiff argued that the height of the Defendant's
15 case, was that the Plaintiff was travelling at or about the speed
16 limit and was in the turning lane prior to the accident and had
17 returned to approximately 3 feet inside his lane by the time of the
18 collision. It was submitted that even if those positions were
19 accepted by the Court (in particular with regard to the lane of
20 travel) they do not equate to any responsibility or
21 blameworthiness on the part of the Plaintiff.



22
23 44. Mr. Wagstaff gave evidence as agreed by Mr. Armstrong that the
24 Defendant was in the centre of his turning lane 2.7 seconds before
25 the accident. It was submitted that as a result, 2.7 seconds prior

1 to the accident there was no hazard on the road, there was
2 nothing that the Plaintiff needed to be concerned about. A driver
3 is not expected to foresee the folly of other road users - *Boardman*
4 *v MoD [2010] LAWTEL 12th November.*

5
6 45. Counsel for the Plaintiff argued that over the course of those 2.7
7 seconds, the Defendant, entirely oblivious to the presence of the
8 Plaintiff on the road directly in front of him with his lights on and
9 not hidden by any bend in the road, traffic or other obstruction
10 continued to pull across the lane and made a collision inevitable.
11 This would have been the case had the Plaintiff been driving
12 straight or at an angle and whether he was driving at 33 mph or
13 43 mph.

14
15 46. It was submitted that the Plaintiff was entirely blameless for this
16 accident, he was well inside his lane at the time of the collision,
17 he was driving at a reasonable speed and he had the right of way
18 and was entitled to proceed along his path. The sole cause of the
19 accident was the negligent driving of the Defendant.

20
21 **Ex turpi causa non oritur actio**



1 47. The Defendant relied on the doctrine of *ex turpi causa non oritur*
2 *actio* in defence of the Plaintiff's claim. In responding, Counsel for
3 the Plaintiff referred to *Tinsley v Milligan [1994] 1 A.C. 340* which
4 had been applied in the Caymanian case of *Valgardson v Chestnut*
5 (2007 CILR 375) as a decision on this issue and its "reliance test"
6 (i.e. the claimant will fail in his or her action if he or she needs to
7 rely on his or her own wrongdoing in order to establish the claim)
8 which has been rejected in favour of a discretion based test as per
9 **Patel v Mirza [2017] 1 ALL ER 191; [2016] UKSC 42** which
10 involves examining all of the factors that weigh for and against
11 permitting recovery and then reaching a conclusion as to the
12 proper outcome in light of those considerations.

13
14 48. In *Patel's case* Lord Toulson stated:

15 *"The essential rationale of the illegality doctrine is that*
16 *it would be contrary to the public interest to enforce a*
17 *claim if to do so would be harmful to the integrity of*
18 *the legal system (or, possibly, certain aspects of*
19 *public morality, the boundaries of which have never*
20 *been made entirely clear and which do not arise for*
21 *consideration in this case). In assessing whether the*
22 *public interest would be harmed in that way, it is*
23 *necessary (a) to consider the underlying purpose of*
24 *the prohibition which has been transgressed and*



1 *whether that purpose will be enhanced by denial of*
2 *the claim, (b) to consider any other relevant public*
3 *policy on which the denial of the claim may have an*
4 *impact and (c) to consider whether denial of the claim*
5 *would be a proportionate response to the illegality,*
6 *bearing in mind that punishment is a matter for the*
7 *criminal courts. Within that framework, various*
8 *factors may be relevant, but it would be a mistake to*
9 *suggest that the court is free to decide a case in an*
10 *undisciplined way. The public interest is best served*
11 *by a principled and transparent assessment of the*
12 *considerations identified, rather by than the*
13 *application of a formal approach capable of producing*
14 *results which may appear arbitrary, unjust or*
15 *disproportionate.”*



16
17
18 49. Factors considered as potentially relevant include the seriousness
19 of the conduct, its centrality to the contract, whether it was
20 intentional and whether there was marked disparity in the parties'
21 respective culpability.

22
23 50. *Patel's case* arose in contract. Counsel for the Plaintiff also
24 referred to the judgment of McLachlin, J in *Hall v Hebert* [1993] 2
25 *R.C.S. 158* as authority for the proposition that obtaining

1 compensation for personal injuries does not want to “profiting”
2 from criminality.

3 *“My own view is that courts should be allowed to bar*
4 *recovery in tort on the ground of the plaintiff’s*
5 *immoral or illegal conduct in very limited*
6 *circumstances. The basis of this power, as I see it, lies*
7 *in the duty of the courts to preserve the integrity of*
8 *the legal system, and is exercisable only where this*
9 *concern is in issue. This concern is in issue where a*
10 *damage award in a civil suit would, in effect, allow a*
11 *person to profit from illegal or wrongful conduct, or*
12 *would permit an evasion or rebate of a penalty*
13 *prescribed by the criminal law. The idea common to*
14 *these instances is that the law refuses to give by its*
15 *right hand what it takes away by its left hand. It*
16 *follows from this that, as a general rule, the ex turpi*
17 *causa principle will not operate in tort to deny*
18 *damages for personal injury, since tort suits will*
19 *generally be based on claim for compensation, and*
20 *will not seek damages as profit for illegal or immoral*
21 *acts.”*



22
23 51. Counsel for the Plaintiff submitted that there could not be any
24 suggestion of profit from the wrongdoing involved. Counsel also
25 submitted that the issue of whether the illegality is central to the
26 claim is a critical factor in tort and personal injury cases.

27

1 52. Counsel for the Plaintiff also cited the case of *Delaney v Pickett*
2 *[2011] EWCA Civ 1532*. In that case the plaintiff was engaged in
3 a joint enterprise drugs run when the driver crashed his car as he
4 sued him for his negligent driving. In rejecting the defence on the
5 grounds that the illegality was incidental to the claim of Ward LJ
6 stated:

7 *"Here the crucial question is whether, on the one hand*
8 *the criminal activity merely gave occasion for the*
9 *tortious act of the Defendant to be committed or*
10 *whether, even though the accident would never have*
11 *happened had they not made the journey which at*
12 *some point involved their obtaining and/or*
13 *transporting drugs with the intention to supply or on*
14 *the other hand whether the immediate cause of the*
15 *Claimant's damage was the negligent driving. The*
16 *answer to that question is in my judgment quite clear.*
17 *Viewed as a matter of causation, the damage suffered*
18 *by the Claimant was not caused by his or their criminal*
19 *activity. It was caused by the tortious act of the*
20 *Defendant in the negligent way in which he drove his*
21 *motor car. In those circumstances the illegal acts are*
22 *incidental and the Claimant is entitled to recover his*
23 *loss."*



24
25 53. Counsel cited *Beaumont & O'Neill v Ferrer [2016] EWCA Civ 768*
26 for contrast. In that case six youths decided to take a taxi into

1 town and "jump it" i.e. exit without paying thus committing the
2 criminal act of making off without paying. The Judge therein noted
3 that the offence was integral to both the claim and the resultant
4 negligent driving which was caused by the driver panicking and
5 driving off with the doors open as the six occupants attempted to
6 jump out.

7
8 54. Counsel for the Plaintiff submitted that the question to be posed
9 is; as a matter of causation, was the damage suffered by the
10 Plaintiff caused by his lack of insurance, license or L plates? It was
11 submitted that it was not and further that it was caused solely by
12 the driving of the Defendant. It was argued that the offences
13 merely provided the opportunity for the Defendant to cause injury
14 to the Plaintiff.

15
16 55. Counsel for the Plaintiff submitted that at trial, the Plaintiff was
17 cross-examined in an attempt to portray his conduct in a negative
18 light and to give the impression he was a deliberately breaking
19 the law with regard to insurance and was a "boy racer" who wasn't
20 capable of driving a motorcycle safely. His responses were:



1 a) He believed insurance was in place. The motorcycle was
2 insured but he was not covered and he mistakenly believed
3 he was.

4 b) Prior to the 6 week lapse prior to the collision, he had not
5 ridden uninsured on the roads.

6 c) He did not require a road test but he had been taught to ride
7 a bike by a professional bike racer who also worked at his
8 workplace (Automotive Art who sell and repair motorcycles).

9 d) That although he enjoyed watching bike racing he did not
10 partake.

11 e) He had ridden bikes frequently but only off road.

12
13 56. It was argued that these responses were truthful and by them,
14 the Plaintiff did not have the appearance of a deliberate law
15 breaker. Further, prior to the accident he was in full time
16 employment and had a clear criminal record. It was argued that
17 these all point away from findings that;

18 (a) with regard to the offence of no insurance that his actions
19 were deliberate

20
21 (b) That his conduct was such that a denial of his claim would
22 be a proportionate response.



1 **Further submissions on the Law**

2 57. Counsel for the Plaintiff disagreed with the submissions on behalf
3 of the Defendant that the decision in *Patel v Mirza* meant that
4 reviewing old authorities was not a profitable exercise. Both
5 Counsel however agreed that Clerk and Lindsell on Tort helpfully
6 assists on the current law post *Patel*.

7
8 58. The following are extracts therefrom, with emphasis added.

9 *“(b) Applying ex turpi causa*

10
11 *Notwithstanding the greater clarity as to the rationale of the*
12 *ex turpi causa defence following the decisions of the House*
13 *of Lords in Gray v Thames Trains Ltd and the Supreme Court*
14 *in Patel v Mirza it remains the case that some degree of*
15 *caution is appropriate in attempting to state how the ex*
16 *turpi causa defence will be applied in practice. There was*
17 *no criticism of Gray in Patel v Mirza, and so the narrow and*
18 *wide form of ex turpi causa set of in Gray will, presumably*
19 *continue to be relevant. If the claimant’s loss falls within*
20 *the narrow form, as an attempt to compensate for or*
21 *mitigate a penalty applied by a criminal court, then it will be*
22 *necessarily be caught by the defence; though the narrow*
23 *form only applies to losses flowing from the sentenced*
24 *imposed, and not to other losses attributable to the*
25 *conviction, If the claimant’s loss potentially falls within the*
26 *wide form of the defence (“you cannot recover*



1 compensation for loss which you have suffered in
2 consequence of your own criminal act") then, according to
3 Lord Hoffman, the defence can apply where it is "offensive
4 to public notions of the fair distribution of resources that a
5 claimant should be compensated (usually out of public
6 funds) for the consequences of his own criminal conduct",
7 and there is a causal link between the illegality and the
8 claimant's damage. The terms "inextricably linked" and
9 "integral part" can be found in earlier cases but the issue,
10 said Lord Hoffman was simply one of causation."

11
12
13 “(i) Seriousness off the claimant’s conduct

14
15 *It is not possible to state with any confidence how*
16 *reprehensible the claimant’s conduct must be. The courts*
17 *tend to approach this as a question of fact, though clearly it*
18 *is linked to the underlying policy of the defence of ex turpi*
19 *causa that an award of damages should not bring the legal*
20 *process into disrepute. This the more serious the offence the*
21 *more likely it is that the defence will apply.”*

22
23
24 “(ii) Causal Connection with the claimant’s loss

25
26 However reprehensible the Claimant own wrongdoing, a
27 plea of ex turpi will only succeed if the claimant’s own
28 conduct has a sufficient causal connection with the injury of
29 which he complains. The "connection" of the illegality with



1 the claimant's injury is essentially a causation test which,
2 sine the decision of the House of Lords in Gray v Thames
3 Trains, is increasingly treated by the courts as the crucial
4 factor. In Delaney v Pickett the Court of Appeal held that a
5 claim by a passenger injured by the negligent driving of the
6 defendant was not defeated by ex turpi causa,
7 notwithstanding that it was probable that both the
8 defendant and claimant were in possession of cannabis with
9 intent to supply it at the time of the accident. The criminal
10 behaviour was not causally linked to the claimant's
11 damage."
12
13

14 59. Counsel concluded by arguing that the Plaintiff was not injured as
15 a result of driving with no insurance, he was injured as a result of
16 the Defendant's driving. It was submitted that the Defence of ex
17 *turpi* fails there and no further consideration was needed.

18
19 60. Further it was claimed that *Patel* was not authority for an
20 extension in the application of the *ex turpi* and was merely an
21 attempt to formulate a fair and balanced approach to the area and
22 avoiding the unfairness that could arise on the application of the
23 reliance test.
24



1 61. It was submitted that the Defendant's attempt to move the *ex*
2 *turpi* defence to cover conduct of the nature and seriousness of
3 the Plaintiff was entirely without precedent and would be a clear
4 error.

5
6 62. Counsel for the Plaintiff argued that judgment should be given in
7 favour of the Plaintiff in full.

8

9 **The Defendant's Submissions**

10 63. It was submitted on behalf of the Defendant that his pre-accident
11 actions included slowing down from his previous travelling speed,
12 indicating using his trafficator, moving from the eastbound
13 travelling lane and partly into the westbound lane in a manner
14 described by the statements which he made close to the time of
15 the accident.

16

17 64. Counsel pointed out that it was agreed by the reconstruction
18 experts Mr. Armstrong and Mr. Wagstaff that at that time of
19 collision the Defendant's vehicle was moving very slowly or was
20 stopped. Further there was no dispute about the position of his
21 vehicle at the time of impact.



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65. Additionally, his speed was confirmed by the joint statement of the reconstruction experts and he did not attempt to suggest that he had seen the motorcycle or had been able to take any avoiding action.

66. Counsel made reference to the Defendant’s evidence that he had been driving since the age of 17 and was now 70 and with only one speeding offence 25 years ago aside from his conviction arising from this accident. He truthfully stated that he had not seen the Plaintiff’s motorcycle or the lights of any vehicle other than that of Mr. Walton before the impact and that he had been concentrating on Mr. Walton. His memory was that he did not stop but was moving forward slowly whilst he waited to see what Mr Walton’s vehicle did. When he realized this was turning then he encroached on the westbound lane. At the moment of the accident he was almost at a standstill. He said that he applied the brakes of his car when he ‘got hit’. He agreed that the road ahead of him was clear and that the police photographs showed a good representation of the scene.



1 67. It was submitted that further evidence of his truthfulness was the
2 Defendant's acceptance that by encroaching on the westbound
3 lane when the Plaintiff's motor cycle was approaching he may
4 have committed an infraction of the provisions of the Road Code.

5
6 68. Counsel argued that consideration needed to be given to the
7 reasons the Defendant did not see the approach of the Plaintiff's
8 motorcycle and whether he had correctly remembered what was
9 said to him by Mr. Walton that the motorcycle had no lights and
10 was speeding.

11
12 69. It was submitted that since neither the Defendant nor Mr. Walton
13 were initially aware of the motor cycle behind Mr. Walton's car as
14 the latter travelled along Shamrock Road, it was possible that the
15 Plaintiff may have driven at a faster speed than Mr. Walton's 35
16 mph and caught up with Mr. Walton's vehicle.

17
18 70. It was suggested that the weakness in Mr. Walton's testimony was
19 that he was trying to deal with events which happened more than
20 four years ago and from beginning to end probably occupied no
21 more than about 3 seconds.



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71. It was submitted that Mr. Walton’s speed estimate was wrong. Events happened very quickly, Mr. Walton’s vantage point was some way along the slip road and he needed to turn to his right to see what was taking place, and therefore there is a question as to just how accurate his evidence was.

72. Counsel for the Defendant argued that there is effectively only one eye witness and that his evidence is of limited quality when analysed. It was submitted that the Court should have regard to the help which can be gained from reconstruction evidence. Although reconstruction evidence relies upon a large number of variables so that a range of conclusions is possible; it was submitted that it is derived from scientific consideration by the experts of a kind which a judge simply cannot undertake.



The Speed of the Motorcycle

73. Counsel for the Defendant referred to Mr. Armstrong’s mistake in the calculations which accompanied his first Report as being unfortunate. He provided a second Report when he appreciated his error during preparations for discussion with the Plaintiff’s

1 expert Mr. Wagstaff. It was conceded that during the trial Mr.
2 Wagstaff raised further questions as to the speed calculations
3 which resulted in a further revision. It was argued that the last
4 estimate was not attacked on the basis of any remaining
5 inaccuracy. However, there remained a difference in the
6 estimations made.

7
8 74. Counsel described Mr. Armstrong's method. It was to consider the
9 various phases following the moment of impact which were (1)
10 Plaintiff's contact with Defendant's vehicle, (2) flight through the
11 air (3) striking the ground (4) whilst sliding to final halt.

12
13 75. The Report submitted that of these (1) the loss of speed from
14 striking the Defendant's vehicle is derived from consideration of
15 the nature of the impact and the change in the Plaintiff's direction
16 of travel. The distance covered during (2) can be used as part of
17 a calculation using formulae developed from research which
18 estimates the launch speed and the beginning of the flight. Loss
19 of speed on striking the ground (3) is based on behaviour of riders
20 in rash videos and (4) from published data.



1 76. The final result as set out in Mr Armstrong's final calculations gave
2 a speed at impact of 34-43 mph.

3

4 77. Counsel for the Defendant critiqued the Reports of the Plaintiff's
5 experts as follows:

6 *"Mr. Wagstaff used two methods for estimating the*
7 *pre-accident speed of the motor cycle. The first was*
8 *based on the distance which P travelled throw the air*
9 *- the "throw distance" and Mr. Wagstaff drew on what*
10 *Mr Walters (reporting for RCIPS) had done*
11 *However, later in his report Mr. Wagstaff points out*
12 *that Mr Walters had underestimated the throw*
13 *distance significantly so that the distance travelled*
14 *through the air to the point of landing would be in the*
15 *range 24 to 34 mph".*

16

17 78. Counsel submitted that this was greater than the only speed which
18 Mr. Walters had suggested - 23 mph which was described as a
19 'minimum'. He argued that this was the only evidence as to the
20 speed of the Plaintiff's motorcycle which appears to have been
21 before the Acting Magistrate when the trial of the Defendant took
22 place.

23



1 79. He went on to submit that *"to the range of 24 to 34 mph an*
2 *addition must be made for the speed lost between the time of the*
3 *initial impact with the SUV and the time P became airborne – the*
4 *point from which the 'throw' is measured. Mr. Armstrong has*
5 *estimated this as 8-10 mph which would give a speed at the*
6 *moment of impact in range 32 to 44 mph. In cross-examination*
7 *Mr. Wagstaff accepted that such an addition in line with Mr.*
8 *Armstrong's methodology would be needed."*

9
10 80. Counsel for the Defendant's further submissions about the expert
11 evidence is quoted below:

12 *"Mr. Wagstaff's second method was based on*
13 *consideration of the extent to which the chassis of P's*
14 *motorcycle and the structure of D's SUV were crushed*
15 *in the accident. This is explained in paragraphs 94*
16 *and 95 of Mr. Wagstaff's report from which it*
17 *would appear that his preference is for the method*
18 *derived from a paper written by Ogden using Equation*
19 *6 the results of which appear later in his report*

20
21 *In the case of the motor cycle, the crush was relatively*
22 *easy to establish. In the case of D's SUV, the task*
23 *was made more difficult because D arranged for*
24 *'amateur' repairs to be carried out. These had been*



1 completed before Mr. Armstrong examined the SUV
2 on 21 December 2013 at which time the most he could
3 obtain was an estimate from D that:-

4 "the right end of the bumper, on the outside of
5 the support post, was bent backward
6 approximately six (6) inches as a result of the
7 accident."

8 "Unfortunately Mr. Wagstaff took it that this was not an
9 estimate but something more exact and said:-

10 "The damage to the Toyota Highlander has also
11 been measured, the front offside bumper
12 reinforcer has been crushed rearwards about
13 6 inches."

14
15 "Therefore Mr. Wagstaff's consideration contains two
16 potential errors in that (1) he thought the crush
17 dimension of 6 inches was accurate and (2) he
18 thought the dimension related to the bumper
19 reinforcer had been damaged whereas it was the right
20 end of the bumper itself. The first of these introduces
21 a variation of +/- 1.6 mph".

22
23
24 "The maths behind this method are explained in Mr
25 Wagstaff's report and result in a speed range of 34
26 to 37 mph. However, it is necessary to apply an error
27 allowance of + / - 10% to this range as Mr. Wagstaff



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says at para 95 of the text of his report this results in a range of 30 mph to 41 mph.

Mr. Wagstaff's opinion on the basis of these estimations changes subtly. In his report he says:-
In my opinion, the speed range calculated for the motorcycle is therefore within the permitted speed limit for the location.

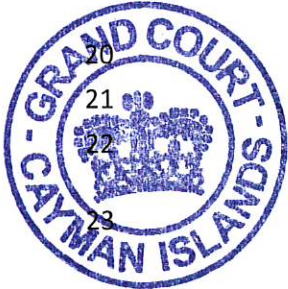
In the Joint Statement, his view becomes:-

"My conclusion for the motorcycle speed is that it was travelling on the correct side of the road at impact, at a speed below or at about the 40-mph speed limit."

At the time of the Joint Statement Mr. Wagstaff had not made the 10% allowance which lifts his bracket using the crush method to 41 mph; had he done this his sentence above should have read:-

"My conclusion for the motor cycle speed is that it was travelling ... at a speed below or just above the 40 mph speed limit."

This would bring Mr. Wagstaff's evidence within a couple of mph of that of Mr. Armstrong."



1 81. Counsel for the Defendant further submitted that it was important
2 to have in mind that the speed estimated by both experts is that
3 at the moment of the impact; before this the motor cycle could
4 easily have been travelling at a different speed. The Plaintiff may
5 have either accelerated or braked in the time shortly before
6 impact. He argued that braking could have occurred if the Plaintiff
7 had noticed the Defendant's vehicle and realised that it was
8 turning right and that acceleration could have occurred if the
9 Plaintiff had unwisely decided to try to speed up to pass in front
10 of the Defendant's vehicle.

11
12 82. The line of travel of the motorcycle was another area of expert
13 dispute.

14
15 83. Counsel for the Defendant submitted that his expert, Mr.
16 Armstrong, was able to see the Defendant's damaged vehicle and
17 use his experience to assess the damage left after the accident
18 (apart from that to the bumper). As such, his evidence was that
19 examination of the vehicle enabled him to deduce how the
20 Plaintiff's body travelled from the initial point of impact along the
21 top of the offside wing/bonnet to the 'A' pillar and offside wing



1 mirror which bore signs of damage. This gave a range of 15° to 20°
2 of which he took a mid-figure of 17°.

3

4 84. Mr. Armstrong also pointed out that to gain a better impression of
5 the movement of the Plaintiff's body across the front of the SUV
6 allowance had to be made for its width.

7

8 85. Counsel for the Defendant pointed out that the accident
9 reconstructionist Mr. Colin Redden examined the Defendant's
10 vehicle and recorded:

11 *"The right side front of the hood has blunt trauma*
12 *contact damages which run off to the blunt trauma*
13 *contact damages on the rear of the right front fender*
14 *indicating the path of travel for the rider travelled*
15 *during the impact, this indicates that the PDOF was*
16 *angled to the left or approx 10 o clock position or that*
17 *the bike was turned slightly to the left when the*
18 *impact occurred. This is also supported by the path of*
19 *travel to final rest."*



20
21 86. Counsel also referred to the following text of Mr. Redden's report:

22 *"When the Yamaha impacted the right front corner of*
23 *the Toyota the rider was projected forward causing his*
24 *legs to contact the right side of the bumper brace this*
25 *is shown by the suspected blood stains on it. He then*

1 *contacted the right side of the hood and continued to*
2 *travel at a left angle off the front fender where he*
3 *travelled to final rest in the grass shoulder by the GIVE*
4 *WAY sign. This is shown by the blunt trauma contact*
5 *damages to the right front and side of the hood and*
6 *the top of the right front fender. This indicates that*
7 *the PDOF was angled to the left for the rider which is*
8 *also supported by the final rest positions of the bike*
9 *and rider as they came to rest on the left of the Toyota*
10 *as shown."*

11
12 87. Counsel argued that Mr. Redden had an advantage over Mr
13 Armstrong in that he was able to see not only the Defendant's
14 vehicle in its post-impact position but would also have been able
15 to see where the Plaintiff had come to rest.

16
17 88. Counsel for the Defendant submitted that Mr. Armstrong's
18 evidence as to the angle of impact is to be preferred to that of Mr.
19 Wagstaff because:

- 20 "(a) *Mr. Armstrong had the advantage of assessing*
21 *it on the basis of an examination of the vehicle*
22 *– which Mr. Wagstaff could not do;*
23 (b) *Mr. Redden saw the same damage and agrees*
24 *about the angle of impact;*



1 (c) *If Mr. Wagstaff had been right, the line followed*
2 *by P's body would probably have brought him*
3 *into forcible contact with the 'A' pillar – which*
4 *did not occur. "*

5
6 89. The Defendant's Counsel argued that the evidence of Mr.
7 Armstrong is that, if the angle of impact was as suggested by the
8 damage which he and Mr. Redden saw, the Plaintiff's motor cycle
9 must have been in the westbound right turning lane shortly
10 before. It was submitted that this deduction must be logical and
11 in accordance with simple physics because the motor could not
12 suddenly have assumed an angle of 15° to 20° by jumping but
13 would have to be steered into such position.

14
15 90. According to Counsel, the obvious reason for Plaintiff's motorcycle
16 to have gone into the westbound lane would be to give space to
17 overtake Mr. Walton's vehicle if he undertook this manoeuvre
18 before Mr. Walton's vehicle had moved into the left turning slip
19 road. Such a scenario would fit with the following:

20 “(a) *P rode along Shamrock Road at a speed faster*
21 *than but behind Mr. Walton's vehicle so that he*
22 *did not see the approach of D's SUV;*



- 1 (b) *P caught up with Mr Walton's car shortly before*
2 *it began turning into the slip road;*
- 3 (c) *P's intended destination, the Esso station, was*
4 *on the right hand side of the road and more*
5 *easily accessible from the westbound lane.*
- 6 (d) *P decided to overtake Mr. Walton's vehicle*
7 *either simply because its speed was lower than*
8 *that at which he wanted to ride or because he*
9 *noticed a slowing or the display of the indicator*
10 *by Mr. Walton.*
- 11 (e) *P pulled alongside Mr Walton's vehicle but, to*
12 *give sufficient clearance, rode into the*
13 *westbound lane;*
- 14 (f) *Having ridden into the westbound lane, P was*
15 *confronted with D's SUV and tried to return to*
16 *the correct eastbound lane but was unable to do*
17 *so and collided with the SUV whilst his motor*
18 *cycle was still at an angle to the line of the road*
19 *as shown in Mr. Armstrong's Figure 36. "*

20
21
22 91. Counsel argued that there was other evidence which supports this
23 scenario. He pointed to Mr. Walton's early memory eight days
24 after the accident which was:

25 *"...Just before I made the turn I put on my left indicator*
26 *and I heard a noise and observed that it was a motor*
27 *cycle going past me..."*



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92. Counsel submitted that if the Plaintiff was already travelling somewhat faster than Mr. Walton, there would have been a temptation simply to pull out and overtake Mr. Walton’s vehicle without slowing; or perhaps speeding up in the process. Unless he returned quickly to the eastbound lane, he would have been in the path of right-turning westbound vehicles.

93. Counsel argued that if Mr. Wagstaff was right and the motorcycle was simply travelling parallel to the line and at a speed at or below the 40 mph limit, it was difficult to see why the collision was not avoided. He pointed to the Experts’ Joint Statement which indicates:

“If Mr. Parchment had maintained his motorcycle in the center of the westbound lane, the collision would not have occurred.”

94. Counsel argued that there was no suggestion that the Defendant was driving fast or disregarding safety. Further, he had taken considerable care in approaching the junction by slowing to an extremely low speed and displaying his indicator.



1 95. Counsel also argued that the Defendant was driving at night and
2 would not have been able to be aware of the presence of the motor
3 cycle until it was close unless he had seen its light. Whether this
4 would be visible would depend upon the position of the motor
5 cycle behind Mr. Walton's vehicle which would shield it and the
6 movements of the motor cycle at or around the time Mr Walton
7 commenced his turn. Even had the motor cycle begun to emerge
8 from the 'shadow' of Mr Walton's vehicle, it may not have been
9 possible to distinguish whilst it was close to and/or alongside.

10
11 96. Counsel submitted that the Defendant's evidence that he
12 concentrated on seeing whether Mr. Walton was carrying straight
13 ahead or was turning was obviously reasonable. The probability
14 being that when he looked ahead and knew that the approach of
15 Mr. Walton's vehicle could prevent him from turning safely, he
16 would have directed his attention to seeing what Mr. Walton's
17 intentions were. Having seen that Mr Walton intended to turn left,
18 he would have transferred his attention to the road into which he
19 was turning and could not reasonably be expected to be looking
20 in two directions at that time.



1 97. Counsel submitted that the Defendant would not be in breach of
2 the duty of reasonable care.

3
4 98. Counsel for the Defendant submitted that this Court has had the
5 benefit of different and more extensive evidence than what the
6 Summary Court received. In particular the only expert evidence
7 heard in the Summary Court was that of Mr. Vincent Walters which
8 gave an incorrect opinion as to the speed of the Plaintiff when his
9 period of flight commenced.

10
11 99. Counsel argued that the Plaintiff decided to overtake at a road
12 junction where there was the prospect of an accident with turning
13 traffic. This it was submitted, was a breach of the Road Code and
14 an act of negligence as any reasonably careful driver would know
15 that overtaking on the approach to a junction carried a risk of
16 encountering turning vehicles.

17
18 100. Counsel challenged the Plaintiff's submission that a motorist
19 should not be "*expected to foresee the folly of other road users*".
20 Counsel for the Defendant referred to the authority relied upon for
21 this quote, *Boardman v MOD* as an authority which could hardly



1 be regarded as having great weight, being unreported.
2 Additionally, he pointed out that there is no transcript of the
3 judgment so that the remarks summarized in the Case Digest can
4 be put in proper context. Lastly, he submitted, it was most
5 important that, on the facts the remark was *obiter* and not
6 necessary for the decision. This is because the defendant driver
7 had seen the relevant hazard (children playing chicken at the
8 roadside) and accepted that in passing a stationary vehicle he had
9 not taken "*a wise decision*" and would have been "*wiser to wait*".
10 Therefore, the case did not concern acts of unforeseen folly but
11 rather foreseen acts.

12
13 101. Further, it was submitted, the Road Code identifies overtaking at
14 a junction as an act which ought "*never*" to be attempted; the
15 reason being that the possibility of turning or emerging vehicles
16 is one which is foreseeable and always present.

17
18
19 102. It was suggested that there was probably a time at which the
20 Plaintiff's visibility ahead was blocked by Mr. Walton's vehicle.
21 This was a further factor which made his overtaking risky from the



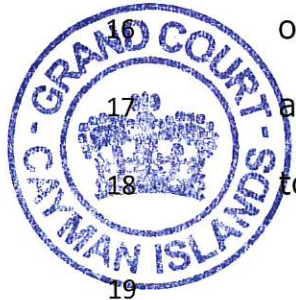
1 start. This would mean that he would not be able to know what
2 may be ahead when he emerged and commenced to overtake.

3

4 103. It was also submitted that a separate act of negligence by the
5 Plaintiff is that he overtook by moving into the westbound turning
6 lane. This created a further risk in that he may encounter a right-
7 turning vehicle, and this happened.

8

9 104. On the issue of speed, Counsel for the Defendant submitted that
10 if the Plaintiff was riding at around the speed limit of 40 mph when
11 he started to pass Mr. Walton's vehicle, he would have gained a
12 forward view and would have been able to see the Defendant's
13 vehicle which was indicating to turn right and probably moving
14 slowly to start this turn. He submitted that there is no evidence
15 that the Plaintiff took any evasive action. There were no marks
16 on the road as may be left by heavy braking. The absence of any
17 avoiding action would be indicative of a poor lookout or a failure
18 to see a hazard ahead.



19

20 105. Another suggested alternative was that the Plaintiff had been
21 riding along Shamrock Road in excess of the speed limit. This

1 would explain how he could have come up behind Mr. Walton
2 without Mr. Walton noticing. It would also explain why he swung
3 into the westbound lane when overtaking Mr. Walton's vehicle and
4 why, even if he managed some braking, his motor cycle still
5 collided with the Defendant's vehicle. Counsel for the Defendant
6 submitted that this second scenario is more consistent with the
7 surrounding circumstances.

8
9 106. Counsel concluded by stating that the evidence showed that the
10 Plaintiff was negligent in the period immediately before the
11 happening of the collision, which he could have avoided.

12
13 **The Defence of Ex turpi causa non oritur action**

14
15 107. This defence, it was submitted was a complete answer to the
16 Plaintiff's claim.

17 108. Counsel submitted that the Plaintiff's actions were illegal and
18 deliberate. The facts clearly established this.

19
20 109. On 17th April 2013 the Plaintiff obtained a provisional licence
21 covering the smaller category of motor cycles which expired on 17



1 October 2013 and then on 19th April 2013 he licensed the Yamaha
2 motor cycle.

3
4 110. Counsel argued that to obtain a licence for the motor cycle, the
5 Plaintiff must have shown a certificate of insurance and to obtain
6 the insurance he would almost certainly have visited an insurer or
7 broker's office and have gone through the process of discussing
8 the types of cover available and the costs. In his evidence the
9 Plaintiff stated that his cover was third party only and that he as
10 owner was the only permitted rider. He also agreed that this form
11 of cover was the cheapest and was normal amongst motor
12 cyclists. On 10th October 2013, Bijon Clarke took out Third Party
13 insurance on the motorcycle. Subsequently the Plaintiff notified
14 the Licensing Department that he was transferring the ownership
15 of the motorcycle. Six days later Plaintiff's provisional licence
16 expired.



17
18
19 111. Counsel challenged the Plaintiff's statement that he '*believed*' that
20 he was covered by Clarke's insurance. Also he did not try to
21 explain why he decided to ride when he had no license. It was
22 argued that if there had been some good explanation for this

1 supposed '*belief*' – such as that Clarke had intended to take out a
2 policy which did cover the Plaintiff but failed to do so or that Clarke
3 had misinformed the Plaintiff about the nature of the policy he
4 had, this was not offered.

5
6 112. Counsel argued that the only reasonable inference to be drawn is
7 that the Plaintiff was prepared to take repeated deliberate chances
8 by riding uninsured and unlicensed fully knowing what he was
9 doing was wrong.

10
11 113. Counsel argued that unlike contributory negligence, this was a
12 complete defence and there was no purpose in considering past
13 attempts to define its scope. It applied across the board in both
14 tort and contract, but the different legal contexts sometimes need
15 to be taken into account.

16
17
18 114. Counsel for the Defendant cited the 22nd Edition of *Clerk and*
19 *Lindsell* which identifies the theories lying behind the defence and
20 he submitted that two of them should be considered here, namely:

21 “(ii) *when awarding damages to the claimant would*
22 *be an affront to the public conscience; ...*



1 (iv) when awarding damages to the claimant would
2 undermine the integrity of the legal system."

3 {Paragraphs 3.08 and 3.14.}
4

5 115. He also referred to the contract/unjust enrichment case of *Patel v*
6 *Mirza* (previously cited) and stated that this case is correctly
7 treated by *Clerk & Lindsell* as primarily being concerned with the
8 integrity of the legal system.

9
10 116. Counsel submitted that there was no suggestion in this majority
11 judgment that the principles set out do not apply to tort claims as
12 well as to other areas and it is clear that the test for application
13 of the defence was to depend on looking at every case against the
14 'range of factors' defined in the key section.

15
16
17 117. Counsel submitted that the editors of *Clerk v Lindsell* in discussing
18 *Patel* at paragraphs 3-25 to 3.28 were correct to state:

19 "...it remains the case that some degree of caution
20 is appropriate in attempting to state how the *ex*
21 *turpi causa* defence will be applied in practice."
22



1 118. It was submitted therefore, what the editors say in the sections
2 headed "*Applying ex turpi causa*", "*Seriousness of the claimant's*
3 *conduct*" and "*Causal connection with the claimant's loss*", are
4 speculative in the absence of subsequent decisions which shed
5 further light on the effect of *Patel*. In particular, Counsel argued,
6 there is no authority as to whether there is still a separate
7 '*causation*' filter. Further, the case of *Delaney* predates *Patel* and
8 does not supply an answer to this question.

9
10 119. Counsel submitted that the "*alternative and preferable view is that*
11 *Patel does provide a set of flexible principles which can be*
12 *accommodated to provide justice in each case, whether in contract*
13 *or tort. The closeness of the connection between the criminality*
14 *which has been displayed by a plaintiff and the injury and loss*
15 *which has been suffered is one of the matters which may be*
16 *considered under (c) – proportionality.*"

17
18 120. Counsel referred to *Beaumont v Ferrer* [2016] EWCA Civ 768
19 [2017] PIQR P1 cited by Plaintiff's Counsel. He submitted that the
20 Court was addressing the case before *Patel* was decided but that



1 the same decision could have been reached if the same facts had
2 been taken into consideration when dealing with proportionality.

3
4 121. Counsel argued that in *"Beaumont the criminal offence of making*
5 *off without payment was an offence of dishonesty which did not*
6 *affect the duty of care which the driver owed to his passengers.*
7 *The criminal intention to make off was present as the claimants*
8 *jumped from the taxi. However, exactly the same kind of*
9 *behaviour could have taken place without the criminal element if,*
10 *for example, the passengers were simply drunken students who*
11 *decided it was more fun to try to get out of a vehicle when it was*
12 *moving. The distinction between the two factual situations would*
13 *be well capable of being dealt with by applying the proportionality*
14 *test so that in the case of the passengers intending to defraud the*
15 *driver, it would be regarded as proportionate that they should lose*
16 *their remedy entirely whilst in the latter situation, the claim*
17 *(based on negligence of the taxi driver) would succeed subject to*
18 *a deduction for contributory negligence."*

19
20 122. It was submitted that an additional advantage to regarding the
21 proportionality test in this way is that it allowed for different



1 circumstances to be accommodated without straining the
2 expression of principle.

3
4 123. Counsel referred to a recent English High Court tort decision
5 stating the following: *"In McHugh v Okai-Koi [2017] EWHC 1346*
6 *(QB) where a motorist under criminal attack by two drunken*
7 *persons had driven away with one carried on the bonnet of her*
8 *car, causing her death. The judge (Mr David Pittaway QC, sitting*
9 *as a Deputy High Court Judge), assumed the defence was*
10 *available, applied Lord Toulson's tests as set out above and*
11 *rejected the defence on the bases that (1) the purposes of the*
12 *criminal law would not be enhanced if the claim were denied and*
13 *(2) that it would be disproportionate to deny the claim. It has to*
14 *be said that the judgment does not contain a great degree of*
15 *discussions of the principles in issue but is, perhaps, an illustration*
16 *of the flexible application of the proportionality test."*

17
18 **Application of the Illegality Defence**

19
20 124. Counsel for the Defendant submitted that the Plaintiff's criminal
21 conduct displayed an absence of willingness to obey the law
22 around motor cycle riding to a serious extent. The Plaintiff did not



1 do what was expected to equip himself to ride and his conduct
2 illustrated precisely the kind of behaviour which the law
3 concerning licensing and insurance are meant to prevent.
4

5 125. Counsel argued that there *"is little doubt of a need to reinforce*
6 *the prohibitions or uninsured / unlicensed riding in the Cayman*
7 *Islands and little doubt that the purposes of these laws will be*
8 *enhanced if a message is given that those who act in this way will*
9 *not have the benefit of damages awards if they suffer accident."*
10

11 126. Counsel also submitted that the *"balance here is that between the*
12 *denial of the claim and the nature and kind of illegality."* He argued
13 that the potentially serious consequences of the Plaintiff's conduct
14 justified denial of the claim.
15

16 127. Counsel argued that the Plaintiff needed to be aware of the proper
17 way to handle a motorcycle. Further he deliberately and knowingly
18 rode without insurance. Counsel submitted that the Cayman
19 Islands are distinct from the UK because the victims of uninsured
20 drivers will be deprived of proper compensation. Counsel for the
21 Defendant argued that within the ambit of *Patel* it is open to this



1 Court to make its own decision based on the local conditions and
2 circumstances.

3
4 128. Counsel submitted that one task of the Court should be to send
5 out a very clear message to those who chose to drive or ride
6 uninsured that they will not be compensated if they are injured.
7 The Court should emphasise the harmful effects of unlicensed and
8 uninsured riding by declining the Plaintiff's claim.

9
10 **Contributory Negligence**

11
12 129. Counsel for the Defendant submitted that if the illegality defence was
13 rejected, it was necessary to consider the position of the two motorists
14 concerned on the basis that each was to blame. On the basis of a finding
15 that both were at fault there comes the issue of apportionment. The
16 Court was required to take into account both the blameworthiness of
17 each party and the causative impact of their conduct.

18
19 130. Counsel submitted that in the UK after 1945, changes in the law
20 introduced a different approach to causation. He stated that
21 *M'Lean v Bell [1932] SC (HL) 21* could not be an authority upon

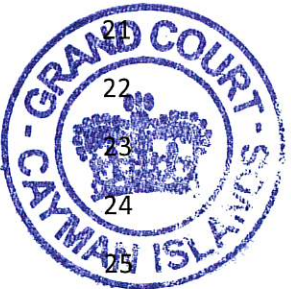


1 apportionment as suggested by the Plaintiff because the power to
2 apportion was not available until 1945.

3

4 131. He submitted that the correct modern approach to apportionment
5 is discussed in Clerk & Lindsell 22nd Edn 2018 starting at
6 paragraph 3-57. As set out at paragraph 3-99 it is:

7 *"The discretion implicit in a test based on what is "just and*
8 *equitable" allows the court to take an ad hoc approach to*
9 *apportionment, treating the issue as essentially a question*
10 *of fact. The court's disapproval of the claimant's conduct*
11 *may be reflected in a large reduction for contributory*
12 *negligence. Where a particular type of accident is common*
13 *it may be sensible to have guidelines for the appropriate*
14 *deduction in order to produce both a reasonable level of*
15 *consistency and certainty. It is not simply a case of*
16 *assessing the comparative blameworthiness of the parties,*
17 *but of their respective "responsibility for the damage". So,*
18 *for example, in the case of breach of strict statutory duty*
19 *the defendant may not have been particularly careless, but*
20 *may still bear a substantial responsibility for the damage. In*
21 *assessing the respective responsibilities of the parties the*
22 *court should take into account the scope of the defendant's*
23 *duty and the extent to which that duty involved taking*
24 *precautions against the claimant's own negligence. That*
25 *should then be weighed against the question of whether the*
26 *claimant's fault was causative of the damage and "if it was,*



1 *what the relative blameworthiness and causative potency of*
2 *the parties' respective faults were"*

3
4 132. On this basis and if there is finding against both parties, Counsel
5 argued, it would require a substantial reduction in the Plaintiff's
6 damages on account of his own negligence.

7
8 133. Counsel submitted that the result should be an equal division of
9 blame.

10
11 **Conclusion**

12 134. The evidence and submissions having been being considered,
13 liability needs to be determined.

14
15 135. The Defendant was convicted in the Summary Court of careless
16 driving in relation to this accident. I accepted the submission that
17 since additional evidence was adduced in this Court, I am not
18 bound by the previous conclusion.

19
20 136. The experts, Mr. Armstrong and Mr. Wagstaff based on their
21 calculations, presented the Court with differing Reports on



1 disputed matters. In addition to this there was the sole eyewitness
2 to events, Mr. Walton.

3
4 137. Mr. Walton, presented as a particularly steady and credible
5 witness. There was speculation on the part of the Defendant that
6 the passage of time may have affected his testimony. I found no
7 reason to so conclude.

8
9 138. I accepted that the Defendant in manoeuvring his vehicle to make
10 a right turn across the westbound lane was not travelling at speed.
11 He was moving very slowly and it is accepted that he did not set
12 out to break or disregard the law.

13
14 139. Nevertheless, the Defendant attempted to make a right-hand turn
15 in a manner which differed from the example set out as
16 appropriate in the Road Code. Effectively, he was cutting the lane.

17
18 140. Further, the Defendant's attention was entirely focused on Mr.
19 Walton's vehicle which was turning to the left from the westbound
20 lane. He entirely failed to observe the Plaintiff's motorcycle which
21 was travelling in the westbound lane and which had on its



1 headlamp. This led to the collision in the westbound lane. The
2 Plaintiff was seriously injured as a result.

3
4
5 141. Based on the foregoing, I find that the Defendant in making his
6 right hand turn fell below the standard required of a reasonable
7 road user. I find that the Defendant was driving negligently and
8 that the Plaintiff was injured as a result.

9
10 142. The next issue for consideration was whether there was
11 contributory negligence on the part of the Plaintiff.

12
13 143. The issue of the Plaintiff's speed was raised.

14
15 144. The experts, Mr. Armstrong and Mr. Wagstaff based on their
16 calculations, arrived at differing speed ranges. The sole
17 eyewitness to the event, Mr. Walton testified that the motorcycle
18 in his estimation, had not been travelling at high speed. Consistent
19 with this testimony of the calculations of the Plaintiff's expert, Mr.
20 Wagstaff.



1 145. I am not convinced based on the evidence before me that the
2 Plaintiff was riding the motorcycle above the speed limit. I find as
3 a fact that he was not.

4
5
6 146. With respect to the angle of impact, I was not satisfied with the
7 evidence on this point. I did not find that it provided sufficient
8 information so as to affect the findings about the lane in which the
9 Plaintiff had been travelling.

10
11 147. I do not accept that the evidence established that the Plaintiff had
12 been in the turning lane and then adjusted his position just prior
13 to the collision. I also do not accept the suggestion that the
14 Plaintiff had been overtaking at a road junction. On all the
15 evidence, I found that the Plaintiff had remained in the eastbound
16 lane.

17
18 148. Based on the foregoing findings, I did not accept the submission
19 that there had been contributory negligence on the part of the
20 Plaintiff.

21



1 149. The Defendant was on stronger ground with the defence of ex
2 *turpi causa non oritur actio*.

3
4

5 150. The Plaintiff clearly broke the law when he rode the motorcycle:
6 with a lapsed license; without displaying L plates and without
7 insurance.

8

9 151. Questioned about the insurance, the Plaintiff asserted that the
10 owner of the motorcycle had told him that he was covered by the
11 owner's insurance. The reasonableness of that belief is accepted
12 to a certain extent. Prior to the date of the accident, the Plaintiff
13 had ridden the motorcycle using his then current license. The
14 license then lapsed and the Plaintiff acknowledged that when he
15 rode the motorcycle with a lapsed license on the date of the
16 collision he was aware that he "was taking a chance".

17

18 152. It is not reasonable to assume that the Plaintiff genuinely believed
19 that any insurance coverage which was in place would have still
20 covered him when he rode with a lapsed license. This aspect of
21 his evidence does not make sense and is not accepted.



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153. The conclusion therefore is that in riding a motorcycle on the night in question, the Plaintiff deliberately broke the laws of the Cayman Islands with respect to: having a valid license; displaying L plates and being covered by insurance. His actions were illegal and he was correctly convicted of these offences.

154. It is appropriate for the Court to consider whether this illegality should apply as a complete bar to the Plaintiff's ability to recover damages from the Defendant.

155. The submission made on behalf of the Defendant that the authorities prior to *Patel* were of no use of the Court is not accepted. It is still appropriate to consider whether the Plaintiff's illegal behaviour caused the damage suffered by him. I do not consider that this was the case. I accept the submission that the Plaintiff's offences merely provided the opportunity for the Defendant to cause injury to the Plaintiff. In that respect I would disallow the defence.


156. In any event, all circumstances considered, it would be a highly disproportionate response to the Plaintiff's illegal conduct to deny



1 him the ability to recover damages in circumstances in which the
2 Defendant was entirely at fault.

3
4 157. The defence of *ex turpi causa non oritur actio* fails. The Defendant is
5 held liable and Judgment is granted to the Plaintiff in this action.

6
7 158. Counsel will have an opportunity to address me on costs at a later date.

8
9
10 
11 _____
12 Nova Hall
13 Judge of the Grand Court (Acting)
14 7th May 2018

